REMEDIES AVAILABLE TO A VICTIM OF EMPLOYMENT DISCRIMINATION

I. INTRODUCTION

In several respects discrimination in employment and hiring practices presents an insurmountable barrier to the Negroes' struggle to achieve equality of treatment. Such discrimination results in social tension, subordinates a race economically, and stifles hope as opportunity is foreclosed. Efforts to eliminate racial discrimination in the employment area have led to the creation and utilization of various agencies, boards, and commissions on the federal, state, and local governmental levels. Legislative, executive, and judicial remedies stand ready to redress the aggrieved Negro and deter discriminatory practices. These devices can effectively reduce discrimination in employment if substantially utilized. To be utilized they must be understood and trusted by those for whose benefit such remedies exist. The present study explains and evaluates the alternatives available to an employee or job applicant who feels he is the victim of racial discrimination.

II. STATE FAIR EMPLOYMENT PRACTICES LAWS

A. *Background*

The Ohio fair employment practices law,[1] like that of most states, establishes an administrative commission charged with eliminating unequal treatment of minority groups through "informal methods of conciliation and persuasion"[2] which removes the expense, inconvenience, and haphazardness of court action.[3] Criminal sanctions have been found too imprecise to deal with certain complex types of misconduct arising from racial prejudice. Administrative enforcement is better equipped for specialized handling of both the determination of guilt and the selection of remedies.[4] The courts have been held in reserve to review the fairness of the administrative action and to enforce compliance with administrative orders.

The administrative method of enforcement of anti-discrimina-

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1 OHIO REV. CODE ANN. §§ 4112.01-.99 (Page 1965).

2 These are the words used in the statute empowering the Ohio Civil Rights Commission to enforce the fair employment practices law. OHIO REV. CODE ANN. § 4112.05 (Page 1965).

3 7 OHIO CIVIL RIGHTS COMMISSION ANN. REP. (1966) [hereinafter cited as COMM. REP.]

4 W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 3-6 (1954).

tion laws evolved in 1941 out of vigorous protests from Negro and other civil rights organizations against the exclusion of minorities from employment in the growing war industry. President Roosevelt responded by issuing an executive order[5] which applied to defense contractors and established a Fair Employment Practices Committee. Subsequently the scope of coverage was broadened by another executive order[6] which applied to all government contracts, not just those dealing with defense, and which required prime contractors to include non-discrimination clauses in their subcontracts. These executive orders provided for inclusion in government contracts of clauses barring discriminatory employment practices by the contractors. The Fair Employment Practices Commission was directed to supervise enforcement of the provisions and was endowed with many of the procedures typical of administrative agencies; however, the commission was denied the power to issue enforceable orders.[7]

The successes and failures of these federal wartime fair employment practice commissions has been adequately recounted elsewhere;[8] it is sufficient for our purposes to note that "the federal government's success, however modest, with a commission specially created to combat discrimination"[9] inspired efforts to obtain fair employment legislation in the states. In 1945, shortly before the federal Fair Employment Practice Commission expired, New York enacted the first state law adopting the commission device. By 1967, thirty-eight states, the District of Columbia, Puerto Rico, and at least fifty-six municipalities had enacted fair employment practice laws. Of the thirty-eight states with such laws, thirty-one provided for enforcement through administrative agencies.[10]

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5 Exec. Order No. 8,802, 6 Fed. Reg. 3109 (1941).

6 Exec. Order No. 9,346, 8 Fed. Reg. 7183 (1943).

7 Exec. Order No. 8,802, 6 Fed. Reg. 3109 (1941).

8 M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 9-17 (1966) [hereinafter cited as M. SOVERN].

9 *Id.* at 20.

10 The following 12 states have no F.E.P. statutes:

Alabama	North Carolina
Arkansas	North Dakota
Florida	South Carolina
Georgia	South Dakota
Louisiana	Texas
Mississippi	Virginia

The following seven states with F.E.P. laws do not provide for adequate enforcement procedures (states to which the federal Equal Employment Opportunity Commission does not defer-discussed in part II of this study):

On July 29, 1959, the Ohio General Assembly enacted a fair employment practices law which prohibits discrimination in employment on the basis of race, color, religion, national origin or ancestry.[11] The law covers employers of more than three persons, labor unions and employment agencies. It applies to discrimination in initial hiring, promotion, wages and working conditions. The Ohio Civil Rights Commission, consisting of five members appointed on a bipartisan basis by the Governor, was created to enforce the law.

Another Ohio statute,[12] somewhat analogous to the previously mentioned federal executive orders, is directed toward a much narrower class than the general fair employment practice act. This statute, enacted in 1935, requires that contracts for public construction between the state and private contractors contain provisions by which the contractor agrees not to discriminate by reason of race, creed, or color in the hiring of employees for the performance of work under his state contract. Additionally, the contractor must agree that he will not discriminate against any employee who is hired for work on the state construction project.[13]

Arizona	Oklahoma
Idaho	Tennessee
Maine	Vermont
Montana	

Hearings on S. 1308 Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., at 69 (1967) [hereinafter cited as *Hearings on S. 1308*].

11 OHIO REV. CODE ANN. §§ 4112.01-.99 (Page 1965).

12 OHIO REV. CODE ANN. § 153.59 (Page 1965).

13 Recent additions to OHIO REV. CODE ANN. § 153.59 (Page 1965) will be discussed at a more appropriate place (part V of this paper). *See also* discussion of Governor Rhodes' Executive Order of June 15, 1966 as subsequently amended, *infra*, part V.

Although not germane to a discussion of employment discrimination, there have been other recent civil rights laws enacted. On October 24, 1961, the Public Accommodations Law was enacted which made illegal the discriminatory denial of service in all places of public accommodation. On October 30, 1965, the Ohio General Assembly passed the Fair Housing Law which made discrimination on the basis of race, color, religion, national origin or ancestry illegal in the field of housing, subject to certain exceptions.

These laws have been supplemented by two Executive Orders by the Governor. The "Executive Code of Fair Practices", issued on June 25, 1963, prohibits discrimination in employment practices by the state, service to the public, the purchase of goods or services, employment services, state apprenticeship and vocational guidance programs, and licensing and regulatory practices. On June 15, 1966, the Governor issued an Executive Order seeking to insure compliance with the fair employment law on state construction projects (a discussion of this Order and its later amendments appears subsequently as noted above).

B. *Procedures and Remedies Under Fair Employment Practice Laws*

1. What Conduct Is Prohibited?

Although "Ohio employs the [same] general procedure as that used by similar agencies in other jurisdictions,"[14] the Ohio fair employment practices law contains provisions which caused it to be "regarded by supporters of such legislation as the most advanced of any fair employment law"[15] at the time it was passed. Ohio provisions differing from the general pattern of such laws are pointed out in the discussion which follows.

Fair employment laws generally prohibit certain discriminatory conduct on the part of employers, labor organizations, and employment agencies. The Ohio law is aimed at conduct by: (1) employers, which the statute defines as including "the state, or any . . . subdivision thereof, any person [defined in Ohio Rev. Code section 4112.01 (a) to include groups of individuals, partnerships, associations, corporations, and others] employing four or more persons within the state, and any person acting in the interest of an employer;"[16] (2) labor organizations, defined to include "any organization which exists for the purpose . . . of collective bargaining or of dealing with employers concerning grievances, . . . conditions of employment;"[17] and (3) employment agencies, which "includes any person regularly undertaking with or without compensation to procure opportunities to work or to procure, recruit, refer, or place employees."[18]

Certain conduct specified in the statute is deemed to be unlawful discriminatory practice and thus prohibited. It is unlawful for an employer to discriminate[19] in hiring, "tenure, terms, conditions,

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14 7 COMM. REP., *supra* note 3 at 11.

15 Robison, *The New Fair Employment Law*, 20 OHIO ST. L.J. 570 (1959).

16 OHIO REV. CODE ANN. § 4112.01 (b) (Page 1965).

17 *Id.* § 4112.01 (d).

18 *Id.* § 4112.01 (e). As will be pointed out in the subsequent discussion of what constitutes unlawful discriminatory practice under Ohio's fair employment law, there are several other persons (as defined by the statute) who are restricted in their conduct in a more narrow sense by this law. Briefly these include joint labor-management committees, *Id.* § 4112.02 (d), persons seeking employment, *Id.* § 4112.02 (f), persons who discriminate against someone who has participated in a proceeding under the fair employment law, *Id.* § 4112.02 (h), and persons who obstruct others from complying with the law, *Id.* § 4112.02 (i).

19 The statutory definition for the word "discriminate" is that it "includes segregate or separate". OHIO REV. CODE ANN. § 4112.01 (G) (Page 1965).

In order to avoid repetition the discrimination which is prohibited is in each instance discrimination based on race, color, religion, national origin, or ancestry.

or privileges of employment, or any matter directly or indirectly related to employment."[20] An employment agency may not discriminate in accepting, registering, classifying, or referring any person for employment[21] and is prohibited from complying with an employer's request for referrals if the request is discriminatory or indicates that the employer discriminates in violation of the fair employment law.[22] A labor organization may not discriminatorily limit or classify its membership,[23] nor may it "[d]iscriminate against any person or limit his employment opportunities, or otherwise adversely affect his status as an employee, or his wages, hours, or employment conditions"[24] unless based upon some legally recognized basis for discrimination, such as qualification. From these provisions it is clear that a union violates the law if it refuses to admit to membership and represent its members without regard to color.

Another provision[25] makes it unlawful for a union to induce an employer to discriminate against job applicants. It provides that it is an unlawful employment practice "to aid, abet, incite, compel, or coerce the doing of any act declared" by the fair employment law to be unlawful "or to obstruct or prevent any person from complying with [it]."[26] Since it is unlawful for employers to discriminate against those applying for jobs, a union which seeks to coerce or induce such discrimination would be violating the law.[27]

In addition to the above conventional prohibitions against discrimination, the Ohio law contains a provision[28] which, when enacted, was unique in dealing with discrimination in apprentice training programs, a problem area under other state fair employment laws.[29] It is an unlawful discriminatory practice "[f]or any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person . . . in admission to, or employment in any program established to provide apprentice training."[30] Special mention of labor-management committees makes them liable in a situation in which responsibility for discrimination is difficult to establish. Where apprentice-

20 OHIO REV. CODE ANN. § 4112.02 (a) (Page 1965).
21 *Id.* § 4112.02 (b) (1).
22 *Id.* § 4112.02 (b) (2).
23 *Id.* § 4112.02 (c) (1).
24 *Id.* § 4112.02 (c) (2).
25 *Id.* § 4112.02 (i).
26 *Id.* § 4112.02 (j).
27 M. SOVERN, *supra* note 8, at 21.
28 OHIO REV. CODE ANN. § 4112.02 (d) (Page 1965).
29 Robison, *supra* note 15, at 575.
30 OHIO REV. CODE ANN. § 4112.02 (d) (Page 1965).

ship programs are nominally under joint union-employer control, responsibility is shunted back and forth between union and employer.[31] Until recently "no other state FEP law except Ohio's [made] any mention of joint labor-management apprenticeship committees; and consequently it [was] doubtful whether any other law actually [covered] discriminatory exclusion from apprentice programs controlled by such committees."[32]

Two shortcomings of Ohio's law with regard to apprenticeship and training programs result from the wording of the statute. First, the limitation of the basis of discrimination to race, color, religion, national origin, or ancestry permits selection of apprentices on a lawful basis such as discrimination in favor of relatives of union members. Recognizing that a man has an interest in helping his children and other relatives obtain employment and in having them follow his line of work, we may nevertheless question whether such interest should be allowed to work to the almost total exclusion of Negroes from the programs necessary to the obtaining of high paying jobs. If the fair employment law is designed to provide equal opportunity to minorities, the only basis for distinction between persons should be their objective qualifications. It is inconsistent to permit nepotism, which has the direct effect of destroying equal opportunity, to co-exist with such a law.

New York's amended law deals at length with the discriminatory selection of apprentices.[33] In addition to prohibiting discrimination on racial and religious grounds, New York requires apprentice training programs to select their trainees on the basis of "their qualifications, as determined by objective criteria which permit review."[34] Only time will tell whether the Ohio General Assembly, like New York's, will respond "to the realization that nepotism is as large a barrier to equal apprenticeship opportunity as racial discrimination."[35]

The second shortcoming of the Ohio provision discussed above is that unlike most states which have laws directly or indirectly prohibiting discrimination in admission to or employment in apprenticeship, and which apply to training or retraining programs other than apprenticeship,[36] Ohio limits its law to "any program estab-

31 P. NORGREN & S. HILL, TOWARD FAIR EMPLOYMENT 48-50 (1964).

32 *Id.* at 95-96. "The New York law was amended in 1962 to include similar provisions N.Y. Executive Law Section 296." *Id.* at 96.

33 N.Y. EXECUTIVE LAW § 296 1-a (McKinney Supp. 1967).

34 *Id.* at § 296 1-a (a).

35 M. SOVERN, *supra* note 8, at 21. *See generally, id.* at 177.

36 BUREAU OF LABOR STANDARDS, U.S. DEPT. OF LABOR, SUMMARY OF STATE FAIR EMPLOYMENT PRACTICE ACTS (Labor Law Series No. 6-A, June 1966).

lished to provide apprentice training."[37] The purpose of the fair employment law would be better served by a prohibition against discrimination in all training programs, rather than those only concerned with apprentice training.

Ohio law[38] proscribes several other specific discriminatory practices of which an employer[39] should be particularly aware. Generally these provisions make it unlawful for an employer to ask applicants any questions concerning their race,[40] to keep a record of an applicant's race, to use application forms which have questions concerning race, to publish any notice or advertisement relating to employment which indicates a racial preference, to apply a quota system, or to utilize in obtaining employees an agency or union known to the employer to discriminate. The employer or "any person acting in the interest of an employer, directly or indirectly,"[41] must supervise his hiring program with care since the specific acts set forth in this part of the statute constitute per se violations. Lack of personal prejudice or of an intention to discriminate will not suffice as a defense for the employer. In proving a violation of the fair employment law it is not difficult for an aggrieved Negro employee to show that the terms or conditions of his employment differ substantially from those of his white co-workers. On the other hand, the rejected job applicant has a much tougher task in ascribing his rejection to unlawful discrimination. But this burden is somewhat relieved by the statute's listing of specific acts which are deemed unlawful discriminatory practices without the necessity of showing intention to discriminate. The rejected applicant without any visible proof that his rejection was based on the fact that he is a Negro may find it easy to show a violation of the law by submitting the employer's application form containing prohibited questions. This ease of proof, along with the likelihood of an employer thinking that so long as he does not discriminate against any individual he has not violated the law, makes it particularly important for an employer to be familiar with and to conduct his hiring practices in accordance with these provisions.[42]

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37 OHIO REV. CODE ANN. § 4112.02 (d) (Page 1965).

38 *Id.* § 4112.02 (e).

39 These provisions also apply to employment agencies and labor organizations.

40 These prohibitions apply not only to discrimination by race but also to color, religion, national origin, and ancestry. For the sake of brevity the term "race" is used in this article to imply the others as well.

41 OHIO REV. CODE ANN. § 4112.01 (b) (Page 1965).

42 "It shall be an unlawful discriminatory practice:

(E) Except where based on a bona fide occupational qualification certified

Two other types of conduct are unlawful under Ohio's fair employment law. The first prohibits anyone in the seeking of employment from advertising his race or from advertising his preference as to race of his prospective employer.[43] The second prohibits reprisals against persons who have opposed unlawful employment practices, filed complaints with the commission, testified, or otherwise assisted in proceedings under the provisions of the fair employment law.[44]

Before discussing the procedure of the Ohio law it should be noted that discrimination by an employer is expressly authorized in two situations. Those employing fewer than four persons are not considered employers for purposes of the act.[45] In addition, any person employed in the domestic service of another is not considered to be an employee and thus is without the law's reach.[46]

2. Procedure

The prohibitions of a fair employment law "are only as effective as the procedural arrangements set up to implement them."[47] The procedure will not be utilized in any but the most extreme cases unless it is easily available to an aggrieved person and provides adequate relief. On the other hand, such a law will be most effective if it receives public acceptance and support, which it will not if the fairness of its results are doubted.

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in advance by the commission for any employer, employment agency, or labor organization prior to employment or admission to membership to:
(1) Elicit or attempt to elicit any information concerning the race, color, religion, national origin, or ancestry of an applicant for employment;
(2) Make or keep a record of the race, color, religion, national origin, or ancestry of any applicant for employment;
(3) Use any form of application . . . seeking to elicit information regarding race;
(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based upon race . . .;
(5) Announce or follow a policy of denying, or limiting, through a quota system or otherwise, employment . . . opportunities of any group because of the race . . . of such group;
(6) Utilize in the recruitment or hiring of persons any employment agency, placement service, training school or center, labor organization . . . known to discriminate against persons because of their race . . . ." OHIO REV. CODE ANN. 4112.02 (e) (Page 1965).

43 OHIO REV. CODE ANN. § 4112.02 (f) (Page 1965).

44 *Id.* § 4112.02 (h).

45 *Id.* § 4112.01 (b).

46 *Id.* § 4112.01 (c).

47 M. SOVERN, *supra* note 8, at 22.

(a) *Complaint*[48]

Charges may be filed with the Civil Rights Commission in writing and under oath[49] by any person.[50] By providing for the filing of a complaint by *any* person the statute omits the common requirement that actions can only be commenced by the *aggrieved* individual. Since "person" is defined to to include organizations and associations[51] it is possible for interested civic groups to initiate enforcement proceedings in those situations in which the nature of the discrimination tends to inhibit the filing of complaints.[52] Furthermore, about half the states with fair employment laws,[53] including Ohio, have empowered their administrative agencies to initiate investigations on their own motion without a complainant. Relief is denied unless a charge is filed within six months after the alleged unlawful practice has been committed.[54] This eases the problem of staleness and the degree of difficulty in finding evidence.

(b) *Investigation*

"Upon the acceptance or initiation of a charge the respondent is notified of the violation with which he is charged and an initial conference set."[55] A field representative investigates the claim and reports his findings, with recommendations, to the Commission. The Commission preliminarily determines what action to take on the basis of these reports and the results of the initial conference.

(c) *Determination of "Probable Cause"*

The Commission may refuse to issue a complaint on the ground that probable cause to credit the allegations of the charge has not been discovered by the investigation. Therefore, "it is not probable that unlawful discriminatory practices have been or are being engaged in,"[56] and the complainant will be so notified. In the period

48 The procedure has been broken down into the same categories as was done in *id.* at 23-26.

49 In the period July 1, 1964, to June 30, 1966, an average of approximately 17% of employment cases were not accompanied by affidavits and did not set forth sufficient information to warrant initiations by the Commission (no affidavit needed). 7 OHIO CIVIL RIGHTS COMM. ANN. REP. (1966).

50 OHIO REV. CODE ANN. § 4112.05 (b) (Page 1965).

51 *Id.* § 4112.01 (a).

52 Robison, *supra* note 15, at 577.

53 BUREAU OF LABOR STANDARDS, U.S. DEPT. OF LABOR, SUMMARY OF STATE FAIR EMPLOYMENT ACTS (Labor Law Series No. 6-A, June 1966).

54 OHIO REV. CODE ANN. § 4112.05 (b) (Page 1965).

55 7 COMM. REP., *supra* note 3, at 11.

56 OHIO REV. CODE ANN. § 4112.05 (b) (Page 1965).

July 1, 1965, through June 30, 1966, forty-eight percent of employment charges were dismissed.[57]

If probable cause is found lacking, the complainant may seek judicial review in an effort to reverse the Commission's determination.[58] Such action, however, seems precarious in light of the following:

> The costs of retaining counsel and prosecuting a court action are prohibitive for the ordinary rebuffed complainant. Moreover, the courts normally give considerable weight to administrative determinations, presuming them to be correct unless clearly persuaded to the contrary, and the dismissal of a complaint is no exception to this general rule. The result is that complainants hardly ever seek judicial reversal of a complaint dismissal. Indeed . . . the courts are rarely called upon by anyone at any time in the administration of state fair employment practices laws.[59]

While such remarks point out inherent weaknesses, it must be remembered that the legislature decided a specialized administrative agency, not a court, would be better equipped to make the determinations and mould the relief in the area of employment discrimination. On the other hand, without judicial review the Commission could decide on the basis of the informal investigation that there was no probable cause to believe an unlawful discriminatory

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57 7 COMM. REP., *supra* note 3, at 19.

58 OHIO REV. CODE ANN. § 4112.06(a) (Page 1965). The procedures for such review are basically as follows: The proceeding must be brought in common pleas court in the county wherein the alleged unlawful discriminatory practice occurred. The action is initiated by filing a petition and serving a copy thereof upon the Commission and all parties who appeared before it. The court, after reviewing the case, may issue an order enforcing, modifying, or setting aside the Commission's determination.

It should be pointed out that this section also applies to the situation in which probable cause is found and the Commission proceeds to a hearing. Judicial review of the post-hearing determination is available to either party claiming to be aggrieved thereby. This is mentioned at this time because some of the following provisions in the section providing for judicial review might only be applicable to a Commission determination subsequent to a hearing.

Upon receiving service of the petition, the Commission must file a transcript of the record of the hearing before it, which shall include all evidence offered. Except in extraordinary circumstances, an objection not urged before the Commission cannot be considered by the court. The court may allow the admission of additional evidence that could not reasonably have been produced before the Commission. Findings of fact by the Commission are conclusive if supported by substantial evidence on the record and such additional evidence as is admitted. Jurisdiction of the court is exclusive and its judgment final subject to appellate review. *Id.*

59 M. SOVERN, *supra* note 8, at 24. Original footnote omitted.

practice had occurred and therefore reject the complainant's charge without ever having a formal hearing. The Commission's decision would be final even though founded on their own interpretation of the law. Thus the Ohio judicial review procedure permits at least to a limited degree "review of complaint dismissals to correct legal errors and also to prevent arbitrary action."[60]

(d) *Conciliation*

If the Commission determines there is probable cause to believe unlawful discriminatory practices have occurred, it will seek "to eliminate such practices by informal methods of conference, conciliation, and persuasion."[61] In fact, the statute allows the Commission no choice by specifically requiring it to attempt to induce compliance by informal methods before a formal hearing may be instituted.[62] Only in a case where an amicable settlement cannot be arranged may the Commission conduct a formal administrative hearing. Uniformly, state fair employment practice commissions have relied heavily on informal conciliation proceedings to effectuate voluntary compliance, and formal action has been utilized only as a last resort.[63] Illustrative of this strong reliance on informal methods in Ohio is the fact that during the period July 1, 1963, to June 30, 1966, the Civil Rights Commission obtained compliance in 332 employment cases and failed to reach an agreement in only one case.[64] In the one public hearing in the area of employment the Commission determined that no unlawful discrimination practice existed and an order was issued dismissing the complaint.[65]

These conciliation negotiations are required by law[66] to be kept confidential, "presumably as an added inducement to the respondent to revise his practices voluntarily,"[67] while the threat of publicity attendant to a formal hearing is held in reserve. Almost every case in which state fair employment commissions find probable cause ends in a conciliation agreement with the employer promising to eliminate any unlawful discriminatory practices.[68]

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60 Robison, *supra* note 15, at 578.

61 OHIO REV. CODE ANN. § 4112.05 (b) (Page 1965).

62 *Id.* § 4112.05 (a).

63 A. ROSS & H. HILL, EMPLOYMENT, RACE, AND POVERTY 512 (1967).

64 5-7 OHIO CIVIL RIGHTS COMM. ANN. REPS. (1964-1966).

65 7 COMM. REP., *supra* note 3.

66 OHIO REV. CODE ANN. § 4112.05 (b) (Page 1965).

67 P. NORGREN & S. HILL, *supra* note 31, at 105.

68 M. SOVERN, *supra* note 8, at 25.

(e) *Public Hearing*

If informal methods prove unsuccessful, the Commission will issue a formal complaint stating the charges against the respondent and containing a notice of public hearing.[69] At this hearing, "[t]hough the Commission is empowered to sit (one or more members) as hearing examiners, they have elected to employ persons outside of the Commission to function in this essential capacity. The examiners are usually practicing attorneys or law school professors."[70] The Attorney General, representing the Commission, presents evidence supporting the complaint.[71] The respondent may file an answer and, either in person or by his attorney, is given an opportunity to rebut the case against him by examining and cross-examining witnesses.[72]

The Commission has the power to subpoena witnesses, books, and papers in its investigation of a case before it.[73] This power should not be underestimated simply because it is vested in an administrative agency; for failure to obey one of those subpoenas "constitutes a contempt punishable, upon the application of the commission, by the common pleas court."[74]

The hearing examiner is not bound by the rules of evidence—

> but shall, in ascertaining the practices followed by the respondent, take into account all reliable, probative, and substantial evidence, statistical or otherwise, produced at the hearing . . . provided that nothing contained in this section shall be construed to authorize or require any person to observe the proportion which persons of any race, color, religion, national origin, or ancestry bear to the total population or in accordance with any criterion other than the individual qualifications of the applicant.[75]

The first part of this provision reflects the view that strict evidentiary rules should not restrict the fact-finding process of an administrative agency. Because discrimination is often difficult to prove,

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69 OHIO REV. CODE ANN. § 4112.05 (b) (Page 1965). Additional requirements provide that the hearings can not be held less than ten days after service of the complaint, and the hearing will be held in the county where the alleged unlawful practice occurred or where the respondent resides or transacts business. The complaint must be issued by the Commission within one year after the alleged discriminatory conduct occurred. *Id.*

70 7 COMM. REP., *supra* note 3, at 11.

71 OHIO REV. CODE ANN. § 4112.05 (b) (Page 1965).

72 *Id.* § 4112.05 (c).

73 *Id.* § 4112.04 (b) (3).

74 *Id.*

75 OHIO REV. CODE ANN. § 4112.05 (e) (Page Supp. 1966).

the legislature decided a commission free from predetermined rules of evidence would be better than a court in resolving the issue. The respondent is protected in that the evidence must be reliable[76] while at the same time there is flexibility in permitting the hearing examiner, experienced in discrimination cases, to determine what is reliable in each situation, rather than following an established rule supposedly designed to exclude unreliable evidence but which sometimes has the opposite effect.

The latter part of the above quoted passage from Ohio's fair employment law reflects the legislature's desire to specifically reject endorsement of the quota plan for eliminating racial discrimination. The proponents of the quota plan believe that current affirmative action is necessary to make up for past discriminations. It is not enough for employers to merely be "colorblind" by hiring employees on the basis of qualifications alone, but given two applicants for a job—one white and the other Negro—they should hire the Negro even though the white is better qualified until they reach their quota (proportion of Negroes to whites in their business similar to that in the population as a whole). This idea has been criticized as being counter-educative (a type of reverse discrimination which embitters whites because of the preferential treatment shown Negroes) and an uneconomical use of human resources.[77] Similar to Ohio, Congress specifically rejected the quota plan in the Civil Rights Act of 1964.[78]

Because of its limited use, it appears that the formal public hearing is more form than substance. Currently, its utility seems to be as a threat to coerce voluntary compliance by the desire to avoid being subjected to the adverse publicity attending such a public hearing. Despite the present situation, however, an increase in the number of public hearings is anticipated in future years because civil rights pressure will continue to mount,[79] the number of charges filed will increase,[80] and increased efficiency in handling cases will permit more to come within the limitation which prevents resort to a public hearing if the commission has failed to issue a complaint

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76 In addition, the statute requires that the testimony at the hearing be under oath and that no person may be compelled to be a witness against himself. OHIO REV. CODE ANN. § 4112.05 (f) (Page 1965).

77 Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern*, 34 U. CHI. L. REV. 817 (1967).

78 Civil Rights Act of 1964, 42 U.S.C. § 2000e - 2 (1964).

79 A. ROSS & H. HILL, *supra* note 63, at 512.

80 7 COMM. REP., *supra* note 3, at 13.

"within one year after the alleged unlawful discriminatory practices were committed."[81]

(f) *Cease and Desist Order*

If there is insufficient evidence to find the respondent guilty, then the complaint is dismissed and the complainant, as in the case of a Commission determination of no probable cause,[82] may obtain judicial review.

If the Commission determines the respondent has engaged in, or is engaging in, an unlawful discriminatory practice it will state its findings of fact and conclusions of law, and will cause an order to be served on the respondent.[83] The Commission has been granted considerable discretion as to the contents of that order as will be noted from the statutory language:

> [The Commission shall issue] . . . an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such further affirmative or other action as will effectuate the purposes of [the fair employment practices law] . . . including, but not limited to, hiring, reinstatement, or upgrading of employees with, or without, back pay, admission or restoration to union membership, including a requirement for reports of the manner of compliance. If the Commission directs payment of back pay, it shall make allowance for interim earnings. Upon the submission of such reports of compliance the commission may issue a declaratory order stating that the respondent has ceased to engage in unlawful discriminatory practices.[84]

The respondent may obtain judicial review of the Commission's order in the manner explained in connection with the discussion of probable cause.[85]

(g) *Judicial Enforcement*

Since the cease and desist order is not self-enforcing the commission must obtain a court order to compel compliance if respondent chooses to ignore the Commission's decision. If respondent fails to institute a proceeding for judicial review within thirty days from the service of the Commissioner's order, the Commission may obtain a common pleas court decree "for the enforcement of such order upon showing that respondent is subject to the commission's

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81 OHIO REV. CODE ANN. § 41112.05 (b) (Page 1965).

82 Judicial review is discussed *supra* note 58.

83 OHIO REV. CODE ANN. § 4112.05 (g) (Page 1965).

84 *Id.* § 4112.05 (g).

85 *See supra* note 58.

jurisdiction and resides or transacts business within the county in which the petition for enforcement is brought."[86] If respondent fails to respond to the court's decree he will be held in contempt of court.

3. Additional Provisions

Ohio's fair employment law requires all employers, labor unions, employment agencies and joint apprenticeship committees to post in conspicuous places on their premises notices approved by the Commission and explanatory of the law.[87] These notices are designed to apprise individuals of the content of the law in the belief that an aggrieved individual aware of the rather simple procedure will be more likely to file a charge than "turn the other cheek." The notices also serve as a constant reminder that discrimination is unlawful, and thus may have a deterrent effect on potential discriminators. Failure to post a required notice is punishable by a fine of not less than one hundred dollars or more than five hundred dollars.[88]

A recent enactment makes the process of filing a charge in Ohio more efficient by granting the authority to administer oaths to the Commission's staff members.[89] As charges must be submitted under oath, this removes the difficulty of a notary not being immediately available.

Another recent enactment gave the Ohio Civil Rights Commission statutory authority to appeal adverse court decisions "relating to the constitutionality, construction, or interpretation of the statutes and rules and regulations of the commission and in matters involving the correctness of the judgment of the court of common pleas that an order of the commission is not supported by reliable, probative, and substantial evidence."[90] This relieves the complainant whose resources may be inadequate to sustain the burden of appeal from an adverse common pleas court review of the Commission's order and permits the Commission to seek appellate review of matters of substantial importance to the administration of Ohio's fair employment practices law.

C. *Effectiveness of State Attempts to Eliminate Discrimination in Employment*

It is difficult to determine the overall effectiveness of state laws

86 OHIO REV. CODE ANN. § 4112.06(h) (Page 1965).
87 *Id.* § 4112.07.
88 *Id.* § 4112.99.
89 OHIO REV. CODE ANN. § 4112.09 (Page Current Service 1967).
90 OHIO REV. CODE ANN. § 4112.061 (Page Current Service 1967).

to eliminate discrimination because there is no way to calculate the number of unlawful practices that are never reported. Also no accurate estimation can be made of how many of the cases dismissed for "no probable cause" involved an unlawful discriminatory practice but failed for lack of proof.

Specific examples of a segregated company hiring Negroes can be shown and credited to the efforts of the state commission. In addition, New York's commission has been in existence long enough to measure results by the census statistics on employment by occupation and color for 1950 and 1960.

> A 1950-60 comparison of nonwhite representation in fourteen middle- and upper-level occupational categories in New York State revealed striking increases in nine categories and significant improvements in the other five. Moreover, on the average the gains in nonwhite representation in New York were more than double, and in several instances more than triple, the corresponding increases in the total for three Midwestern states that had nonenforceable laws during 1950-60.[91]

There seems to be little criticism of the substantive provisions of a strong fair employment practices law like Ohio's "[I]t is the virtually unanimous opinion of experts on . . . fair employment practices legislation that only administrative enforcement has any hope of success"[92] in eliminating employment discrimination. Criticism, when it exists, usually attributes lack of adequate results to ineffective administration of the fair employment legislation. Insufficient budgets and lack of professional full-time staffing are often mentioned as points of weakness.

Ohio's Civil Rights Commission reports that "Ohio continues to forge ahead steadily, if not spectacularly, in its approach to the fulfillment of the promise of equality for all its citizens."[93] "The procedure does not make for rapid elimination of discrimination in employment . . . ."[94] There will be those who will demand spectacular results and rapid elimination of discrimination, claiming Negroes have unjustly suffered too long. No doubt they have, but if suffering is meant to refer to the economic plight of the Negro it does little good to confuse one's goal of elimination of poverty with that of elimination of discrimination. Poverty is still poverty whether it is spread equally between whites and Negroes or is more prevalent among Negroes. Also, if it is asserted that the Ne-

91 P. NORGREN & S. HILL, *supra* note 31, at 144.

92 M. SOVERN, *supra* note 8, at 56.

93 7 COMM. REP., *supra* note 3, at 4.

94 *Id.* at 12.

gro's suffering stems from the psychological impact of discrimination and the wounds to his pride from unemployment and underemployment, a close look should be taken at the spectacular and rapid method of the government's forcing an employer to hire a certain percentage of Negroes. It would not seem to help a man's pride to know he holds his job not because of his qualifications, but because he is Negro.

It is not the purpose of this comment to discuss policy. The writer only wishes to point out a belief that many states have sufficient instruments to combat discrimination in employment. These should not be overlooked; rather efforts should be made to increase their effectiveness by supporting commission budget increases, encouraging filing of charges, and cooperating with commission industry surveys and educational programs.

III. The Federal Employment Opportunity Commission

A. *Prohibitions and Coverage*

To supplement existing state fair employment practices legislation and municipal ordinances and, more importantly, to fill the vacuum where none existed, Congress on July 2, 1964, passed Title VII of the Civil Rights Act of 1964.[95] This provided a national remedy for a national problem.

Congress' creation resembles state laws in its substantive prohibitions. Title VII proscribes discrimination based on race, religion, color, or national origin whether it be perpetrated by employers, unions, or employment agencies. The federal law is unique in that it also prohibits discrimination on the ground of sex. Discriminatory conduct in hiring, compensation, promotion, training, discharge, and union membership are proscribed, as are segregated working conditions, classification of employees by race, and advertisements suggesting that a racial standard will be applied to job applicants.[96] Those barred from discriminating must post in appropriate places approved notices containing information about the law,[97] and must keep records and make reports as prescribed by regulation.[98]

The reach of the federal legislation is limited in two general ways. First, only "a person engaged in an industry affecting commerce" or the "agent of such a person" is considered an employer under Title VII. Second, an employer must employ at least twenty-

95 42 U.S.C. §§ 2000e - 2000e-15 (1964).

96 *Id.* § 2000e-2.

97 *Id.* § 2000e-10 (a).

98 *Id.* §2000e-8 (c).

five employees.[99] In addition, Congress saw fit to exclude several other groups of employers. Among these are the federal government, state governments or any political subdivision thereof, educational institutions with regard to employees working in educational activities and all employment in religious educational institutions, employers on or near Indian reservations with regard to preferential treatment of Indians, religious institutions with regard to employees working in connection with religious activities, and private clubs. Although twenty five is purely an arbitrary figure and some have felt Congress failed to reach far enough,[100] the exclusion of enterprises with fewer than twenty five employees was probably based on the belief that the increased expense would strike an inverse proportion to the results obtainable. It was hoped that from one charge filed against a substantial employer, one investigation would be conducted and one hearing held with the resulting conciliation agreement ending discrimination to the benefit of a substantial number.

Other exclusions from the Civil Rights Act's definition of "employer," and therefore from the prohibition against discrimination created by federal legislation, have been questioned. Exclusion of federal and state governments from the provisions of Title VII does not appear to be too serious even though it involves a vast number of employees— "[a]pproximately one out of every six jobs is on a government payroll."[101] Judicially enforceable constitutional restraints, legislative remedies, and executive orders prohibit discrimination by governmental units. But it has been pointed out that this "exclusion means that victims of government discrimination are left to their old remedies. If Title VII offers something better, the failure to make it available to victims of government discrimination is regrettable."[102] It has been recommended that "Congress could usefully have supplemented the judicial remedy with the sort of administrative relief the state commissions are empowered to

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99 *Id.* § 2000e(b). The "affecting commerce" and "twenty-five or more employees" limitations are also relevant to the definition of employment agencies and unions.

It should be pointed out that on July 2, 1965, the date the employment discrimination provisions became effective, the law only applied to employers of 100 or more. On July 2, 1966, it became applicable to employers of 75 or more, and on July 2, 1967, employers of 50 or more employees were reached. On July 2, 1968, the Act will reach its fullest coverage, employers of 25 or more.

100 M. SOVERN, *supra* note 8, at 64-65.

101 *Id.* at 66.

102 *Id.*

give."[103] The exclusion of private clubs and Indian tribes has been criticised on the ground that it detracts "from the basic principle that racial discrimination in employment is wrong" and reflects a "confusion of objectives" by Congress.[104]

B. *Procedures*

To effectuate the objectives of Title VII of the Civil Rights Act of 1964 the Equal Employment Opportunity Commission was established.[105] It is composed of five members appointed on a bipartisan basis by the President of the United States with approval of the Senate. The Commission's two basic responsibilities are: (1) the compliance program in which it investigates complaints of discrimination, and if they are found to be justified, a remedy is sought by the process of conciliation; and (2) the technical assistance program in which the Commission offers advice and assistance, educational aids, and affirmative projects in an effort to promote programs of voluntary compliance with the objectives of the Civil Rights Act of 1964.[106]

If a person feels he is the victim of discrimination by an employer, labor union, or employment agency, he may file with the Commission a sworn, written charge claiming he has been aggrieved by an unlawful employment practice.[107] Individual commissioners may initiate complaints if they receive information leading them to have "reasonable cause to believe a violation" of Title VII has occurred.[108] In the case of an isolated violation, the charge must be filed within ninety days of the date of the alleged act of discrimination in those states which do not have a fair employment practices law, and within 210 days in states like Ohio in which the charging party is required to first proceed before the state fair employment practices commission, or within thirty days after receipt of notice of termination of the state proceeding, whichever is earlier.[109] If the alleged discriminatory practice constitutes a continuing violation, such as the maintenance of a discriminatory seniority system, pay scale, or segregated facilities, the charge may be filed

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103 *Id.* at 250.

104 *Id.* at 66-67.

105 42 U.S.C. § 2000e-4 (1964).

106 *Hearings on S. 1308, supra* note 10, Statement of Stephen N. Shulman, Chairman, Equal Employment Opportunity Commission.

107 42 U.S.C. § 2000e-5 (a) (1964). *See* E.E.O.C. Regulation 1601.11, 29 C.F.R. 1601.11 (1966), for specifics to be included in the charge.

108 *Id.*

109 42 U.S.C. § 2000e-5 (d) (1964).

with the Commission at any time.[110]

After a charge has been filed, the Commission conducts an investigation, following which it will either dismiss the charge on a finding that the facts do not support it or will find reasonable cause to believe the claimant has been unlawfully discriminated against. If "cause" is found, the Commission will attempt to conciliate in the hope of obtaining voluntary compliance with the provisions of Title VII. Where conciliation fails to obtain voluntary compliance, the aggrieved person may, within thirty days after notification thereof, file a civil action against the alleged discriminating party in federal district court.[111] If the court finds in favor of the person filing the charge, it may grant an injunction and order other appropriate affirmative action which may include reinstatement or hiring, with or without back pay.[112] "Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance."[113]

During the investigation of a charge, the Commission or its designated representatives are authorized at all reasonable times to have access to and the right to copy any relevant evidence of any person being investigated.[114] Should a person refuse to comply with a written demand for permission to examine evidence, the Commission is authorized to seek an order from an appropriate federal district court compelling compliance.[115]

Congress has banned public disclosure of the contents of a charge or the results of investigations prior to the institution of court proceedings.[116] This is in line with state laws which recognize the policies behind concealment until the public hearing stage is reached. In order to encourage frankness in conciliation, there is also a prohibition against any disclosure of things said or done as a part of the conciliation process without the consent of the parties

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110 1 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM. ANN. REP. 49-50 (1966).

111 42 U.S.C. § 2000e-5 (e) (1964).

112 *Id.* § 2000e-5 (g).

113 *Id.* § 2000e-5 (e). Another provision allowing the Attorney General to institute litigation in the employment discrimination area should be noted. Under 78 Stat. 261, 42 U.S.C. § 2000e-6 (a) (1964) the Attorney General may bring a civil action in the appropriate federal district court whenever he has reasonable cause to believe a person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment by others of the rights secured by Title VII.

114 42 U.S.C. § 2000e-8 (a) (1964).

115 *Id.* § 2000e-9 (b).

116 *Id.* §§ 2000e-5 (a) and -8 (e).

involved.[117] Criminal penalties are provided for violations of these prohibitions by members of the Commission or employees thereof.[118]

Title VII provides that where the alleged unlawful employment practice occurs in the state or subdivision thereof which has an enforceable law prohibiting such practice and under which an authority is established to grant or seek relief, that state or local authority must receive an opportunity to process the charge before the procedures of the Commission may be invoked.[119] The person aggrieved may not file a charge with the Equal Employment Opportunity Commission until sixty days after the commencement of state proceedings[120] or within thirty days of the termination of the state proceedings,[121] whichever is earlier. If a charge is submitted to the Commission which should have been initially brought before a state agency, the Commission will forward the charge to such agency. After the expiration of sixty days the Commission will contact the charging party to see if he wishes it to assume jurisdiction. If "the charging party is satisfied with the state agency's disposition, the Commission will not proceed further with the case."[122]

Congress' choice to leave operative and defer to enforceable state fair employment practices laws was a wise one.

> Title VII's procedures for implementing its bans on discrimination are probably inferior to those in many states. To have ousted state law, then, would have left Negroes in those states worse off than they were before. In addition, a number of states without enforceable fair employment practices laws decided, after Title VII was enacted, that their own administration would be preferable to the federal variety: the result was a flurry of new statutes that seem considerably superior to the federal law.[123]

C. *Effectiveness*

No doubt passage of Title VII of the Civil Rights Act of 1964

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117 *Id.* § 2000e-5 (a); 1 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM. ANN. REP. (1966).

118 42 U.S.C. §§ 2000e-5 (a), -8 (e) (1964).

119 *Id.* § 2000e-5 (b).

120 *Id.*

121 *Id.* § 2000e-5 (d).

122 EQUAL EMPLOYMENT COMM. REP., *supra* note 117. *See* Memorandum of Understanding Between The Ohio Civil Rights Comm. and The Equal Employment Opportunity Comm., COMM. REP., *supra* note 3, at 91-96.

123 M. SOVERN, *supra* note 8, at 92. The author discusses four important advantages in allowing the states to continue their campaigns against discrimination: preservation of accumulated experience and relationships; an atmosphere of local involvement; conservation of federal resources; opportunity to experiment. *Id.* at 92,93.

was a significant event in this country's effort to eliminate discrimination in the employment area. It marked the first time that the Congress of the United States had declared discrimination by private employers, employment agencies, and unions unlawful. The nation's policy is clear; the question remaining is whether Congress' creation goes far enough to substantially implement that policy.

The mere fact that the law exists will inhibit some who might otherwise discriminate, although it would be idealistic to assume many of those with a personal bias will cease discriminating merely because that is what the law commands. There are those with no particular bias who discriminated in order to avoid disfavor of their peers or conflict with the mores of their community, who might change their practices and avoid criticism by blaming it on the new federal law. Probably a much larger group consists of those who will ignore the law until a complaint is filed pursuant thereto. Of these, some will give in to the conciliatory efforts of the Equal Employment Opportunity Commission while others will firmly resist compliance with the law.[124] If this latter group is of significant size, it would seem that by withholding enforcement powers from the Commission, Congress's effort to eliminate discrimination in employment was rather half-hearted. The Chairman of the Equal Employment Opportunity Commission has pointed out that "a sizable minority of persons whose rights to equal employment opportunity have been violated do not at present receive redress from the Commission. Their only recourse is to initiate private suit, unless the Attorney General finds that a pattern or practice of discrimination exists."[125] The extent of this sizeable minority is as follows:

> In fiscal year 1966 conciliation of 191 charges was completed. Of these, 131 were successful or partially successful; or 69 percent of the total.
>
> So far during fiscal year 1967, conciliation has been completed for 628 charges, of which 357 were successful or partially successful, for a rate of 57 percent of the total.
>
> As you can see, the percentage of successful conciliations has decreased, and the trend continues in that direction.[126]

The difficulty with relegating an aggrieved person to the courts if the Commission fails to get results is that, of those who will presevere this far, many will quit because "the aggrieved may have to

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124 M. SOVERN, *supra* note 8, at 101-102.

125 *Hearings on S. 1308, supra* note 10, at 54.

126 *Id.*

pay fees, security and costs for himself and, if unable to prove discrimination, for the defendant. Most victims of employment discrimination are in no position to take such an economic risk."[127]

A bill[128] presently in Congress would substantially increase the effectiveness of the Equal Employment Opportunity Commission by giving it enforcement powers similar to those held by state agencies and discussed previously herein in connection with Ohio's Civil Rights Commission.[129] Under this bill, after the Commission determines that further conciliation efforts are unwarranted, the following steps would take place:

> The Commission would issue and cause to be served upon the respondent a complaint stating the facts on which discrimination is alleged.
>
> A hearing would then be held before the EEOC or its member or agent.
>
> After the hearing, if the Commission found that the respondent had engaged in an unlawful employment practice, it would state its findings of fact and issue a cease-and-desist order. This order could include appropriate affirmative relief, such as reinstatement and payment of back wages, and could also require the respondent to make reports from time to time on the extent of his compliance. If the Commission found that no unlawful employment practice occurred, the complaint would of course be dismissed.
>
> Once a cease-and-desist order was issued, the EEOC could petition a court of appeals where the unlawful employment practice occurred or wherein the respondent resided or transacted business for the enforcement of the Commission's order. The Attorney General would then litigate the case.
>
> Any respondent or person aggrieved by a Commission order could likewise obtain review of the order in an appropriate court of appeals.
>
> The aggrieved person would have the right to bring a civil action . . . if within 180 days of filing his charge the Commission had . . . failed to issue a complaint or upon receipt of a

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127 *Id.* at 51.

128 S. 1308, 90th Cong., 1st Sess. (1967).

129 Effective enforcement machinery is indispensable to an effective equal employment opportunity law. The experience of state and local agencies show that impotence will frequently be met with intransigence, that conciliation works best when compulsion is waiting in the wings.

M. SOVERN, *supra* note 8, at 80.

> The Commission has had only limited success in obtaining voluntary compliance. Enforceable cease and desist authority will undoubtedly lead to greater success. The Commission's effectiveness as a conciliator would be enhanced. Those subject to the Act will be more willing to negotiate. Experience of the state fair employment agencies support this proposition.

Hearings on S. 1308, supra note 10, at 51.

> notice . . . of its intention not to issue a complaint, whichever is earlier. This would include the situation where failure to issue a complaint resulted from . . . voluntary compliance satisfactory to the Commission, but not to the aggrieved person.[130]

It is difficult to measure the total effect in eliminating discrimination that has evolved out of passage of Title VII of the Civil Rights Act of 1964, but it is known that out of over 16,000 charges received by the Commission, 488 were successfully or partially conciliated through the use of the federal procedure.[131] An increased staff supplied with an increased budget could handle more charges in less time with more adequate investigations. If, in addition, the Commission were given enforcement powers to force into compliance those who resisted conciliation, and to use as a threat in the process of conciliation, a substantial increase in results could be expected.

Even more difficult to measure is the effectiveness of the Commission's educational, promotional, and technical assistance programs. The hundreds of speeches, press releases, meetings and pamphlets have helped, and will continue to help accomplish the purposes of Title VII through the medium of education.

IV. The National Labor Relations Board

Another federal agency which has become increasingly important in prohibiting certain discriminatory practices by labor unions and employers is the National Labor Relations Board. This prohibition arises out of the "duty of fair representation" which is nowhere expressed in the National Labor Relations Act,[132] but which has been implied from its provisions. Under the Act, when a union is selected by a majority of employees to be their collective bargaining agent, it becomes the exclusive representative of all the employees whether they desire to be represented by it or not.[133] Since the union is the exclusive representative, all employees are bound by its collective agreements and none may choose to have any other union bargain for him or even to bargain for himself.[134] "Because the majority choice is imposed upon everyone in this way, the Su-

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130 *Hearings on S. 1308, supra* note 10, at 54-55.

131 *Id.* at 53-54. These figures, as of April 12, 1967, do not tell the whole story. Many of the 16,000 charges were referred to state agencies, closed for lack of jurisdiction, or returned for additional information. Many others had not yet reached the conciliation stage.

132 29 U.S.C. §§ 151-168 (1965).

133 N.L.R.A., 29 U.S.C. § 159(a) (1965).

134 M. Sovern, *supra* note 8, at 144-45.

preme Court has consistently held that these statutes require the union to represent everyone in the unit fairly."[135] Unions violate this "duty" when they seek the removal of Negroes from their jobs in order to make room for whites,[136] deny equal promotion opportunities to Negroes,[137] fail to protect Negroes from discriminatory demotions and discharges,[138] cause an employer to discriminate against Negroes with respect to job classifications,[139] insist upon segregated facilities,[140] or maintain and enforce an arrangement whereby work is distributed discriminatorily in favor of an all white local over an all Negro local and whereby the two are forbidden to work together.[141]

Since this "duty of fair representation" is not expressed in the statutes, the question arises as to how it is to be enforced. The NLRB has two basic avenues of enforcement when unions unfairly represent some employees: "refusal by the Board to aid unions to become or remain exclusive representatives . . . and unfair labor practice proceedings."[142] If the Board's power were limited to revoking or denying certification as exclusive representative, thereby making uncertified unions vulnerable to raids by other unions and unable to file unfair labor-practice charges against employers, enforcement would be relatively ineffective against many of the strong unions who "could get along quite well without their certifications."[143] It would be particularly impotent against the strong craft unions which have reputations of being most discriminatory.[144]

> Unfair labor practice proceedings constitute a far more powerful sanction than [refusing to recognize a union as exclusive representative] . . . because they eventuate, when the charge is well founded, in a cease-and-desist order directing the

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135 *Id.* at 145. Steele v. Louisville & N. R.R., 323 U.S. 192 (1944), involving the Railway Labor Act; *accord, e.g.,* Conley v. Gibson, 355 U.S. 41 (1957) involving Railway Labor Act; Syres v. Oil Workers, 350 U.S. 892 (1956) involving the National Labor Relations Act; Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949) involving the Railway Labor Act.

136 Steele v. Louisville & N. R.R., 323 U.S. 192 (1944).

137 Dillard v. Chesapeake & O. R.R., 199 F.2d 948 (4th Cir. 1952).

138 Conley v. Gibson, 355 U.S. 41 (1957).

139 Brotherhood of Trainmen v. Howard, 343 U.S. 768 (1952).

140 Rubber Workers Local 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 88 S. Ct. 53 (1967).

141 NLRB v. Local 1367, I.L.A., 368 F.2d 1010 (5th Cir. 1966), *cert. denied,* 88 S. Ct. 58 (1967).

142 M. SOVERN. *supra* note 8, at 155.

143 *Id.* at 160.

144 R. MARSHALL, THE NEGRO AND ORGANIZED LABOR 239 (1965).

> respondent to fulfill his obligations under the law. Such an order, when enforced by a federal court of appeals, is backed up by the court's contempt powers. If, therefore, violation of the duty of fair representation is an unfair labor practice, a violator can be ordered to represent fairly and can be fined or imprisoned for disobedience of that order.[145]

The problem with finding violation of the "duty of fair representation" to be an unfair labor practice was the Act's failure to mention such a duty. Not until 1962, did the NLRB hold unfair representation to be an unfair labor practice.[146] The Board reasoned that section 8 (b) (1) of the National Labor Relations Act makes it an unfair labor practice for a union "to restrain or coerce employees in the exercise of the rights guaranteed in [section 7] . . ."[147] and that the right to be represented fairly, although not mentioned in section 7,[148] is guaranteed by that section. Along the same reasoning, section 8 (a) (1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7];"[149] therefore when an employer accedes to a union request which is a violation of the "duty of fair representation," he has committed an unfair labor practice by interfering with a section 7 right.

Although the NLRB had held unfair representation to be an unfair labor practice, there remained until recently doubt as to whether the courts would accept this position. This doubt was enhanced by the possibility that passage of Title VII of the Civil Rights Act of 1964 might be held to have pre-empted NLRB from cases involving employment discrimination.

In *Rubber Workers Local 12 v. NLRB*[150] the court upheld the Board's position, finding that a local union, in refusing to represent complaining Negro members in their grievances in regard to seniority and segregated plant facilities, in a fair and impartial manner, committed an unfair labor practice by restraining such

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145 M. SOVERN, *supra* note 8, at 161. Original footnote excluded.

146 Miranda Fuel Co., 140 NLRB 181 (1962), *enforcement denied*, 326 F. 2d 172 (2d Cir. 1963). This case did not involve racial discrimination, but the following decisions similarly holding unfair representation to be an unfair labor practice did: Independent Metal Workers Union, Local 1, 147 NLRB 1573 (1964); Local No. 12, United Rubber Workers, 150 NLRB 312 (1964), *enforcement granted*, 368 F. 2d 12 (5th Cir. 1966), *cert. denied*, 88 S. Ct. 53 (1967); Local 1367, I.L.A., 148 NLRB 897 (1964), *enforcement granted*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 88 S. Ct. 58 (1967).

147 29 U.S.C. § 158 (b) (1) (1965).

148 *Id.* § 157 (1965).

149 *Id.* § 158 (a) (1) (1965).

150 368 F.2d 12 (5th Cir. 1966), *cert. denied* 88 S. Ct. 53 (1967).

members in the exercise of their right to bargain collectively through their chosen representatives.[151] The court expressly held that "a breach of the duty of fair representation constitutes an unfair labor practice."[152] The court also said that the fact that Congress provided specific protection to employees from union and employer discrimination in the area of civil rights by Title VII of the Civil Rights Act of 1964 does not preclude determination that a breach of a union's duty of fair representation constitutes an unfair labor practice.[153]

In another recent case, *I. L. A. Local 1367 v. NLRB*,[154] the court upheld an NLRB cease-and-desist order against the Longshoremen's union. The union had chartered two locals, one all-white and the other all-Negro, to represent longshoremen in a Gulf Coast area. The NLRB found a violation of section 8 (b) (1) (A) of the Taft Act in the union's maintaining and enforcing a seventy-five to twenty-five percent work distribution, with seventy-five percent of available work being allocated to the white local, and by maintaining and enforcing an arrangement forbidding assignment of white and Negro gangs to work together.

In both the above cases, the Board ordered the unions to cease the discriminatory practices, and the orders were upheld by the courts. The Supreme Court of the United States denied certiorari in each case, which technically did not affirm the lower courts' decisions, but had "the practical effect," an NLRB official commented, of giving "the Board a green light to 'proceed with what we are doing' for '[i]t's fair to assume the Board now will apply its authority' against unions that discriminate."[155]

These decisions are significant in their recognition of racial discrimination constituting a violation of the "duty of fair representation" as an unfair labor practice, thus giving the NLRB power to issue cease-and-desist orders — a power which the Equal Employment Opportunity Commission lacks. They point out that the NLRB can and will play an increasing role in the battle to eliminate discrimination in employment.[156] This can be a very helpful

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151 *Id.* at 20.

152 *Id.* at 24.

153 *Id.*

154 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 88 S. Ct. 58 (1967).

155 Wall Street Journal, Oct. 10, 1967, at 4, col. 4 (midwest ed.).

156 Scholarly commentary on the "duty of fair representation" and its possible extent appear in: Cox, *The Duty of Fair Representation*, 2 VILLANOVA L. REV. 151 (1957); Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?* 24 MD. L. REV. 113 (1964); Sherman, *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 49 MINN. L. REV. 771 (1965);

remedy both because of the Board's enforcement powers and because the government pays the expenses, including the cost of litigation.

V. President's Executive Orders and the Office of Federal Contract Compliance

Contractors dealing with the federal government are subject to another weapon in the arsenal of methods devised to attack discrimination in employment. Nondiscrimination clauses in government contracts have been required since President Roosevelt's Executive Order in 1941.[157] The current Executive Order[158] abolished the President's Committee on Equal Employment Opportunity and vested its authority over government contractors in the Labor Department's Office of Federal Contract Compliance. Jurisdiction over discrimination in federal government employment is vested in the Civil Service Commission. Generally, all contractors and subcontractors working on contracts and federally assisted construction which exceed 10,000 dollars or contracts or purchase orders for standard commercial supplies and raw materials which exceed 100,000 dollars are subject to certain duties flowing from the nondiscrimination clauses in their contracts. They must not only refrain from discrimination, but must also take affirmative action to ensure equal job opportunities. Notice of their nondiscrimination policy must be in all advertisements for employees, on posters, and must be given to their unions. They are obligated to submit to compliance investigations and file reports as required by the Secretary of Labor.

Complaints of discrimination may be filed with the Office of Federal Contract Compliance or the particular federal agency which issued the contract. Filing must be within ninety days from the date of the alleged discrimination, unless an extension is granted upon a showing of good cause. If investigation indicates the existence of an apparent violation of the nondiscrimination clause, efforts will be made to seek compliance by conference, conciliation, mediation, or persuasion. If such efforts fail, sanctions may be imposed, including publishing the names of violators, cancelling or suspending the contract, barring the contractor from future government contracts, recommending that the Justice Department bring

Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 Col. L. Rev. 563 (1962); M. Sovern, Legal Restraints on Racial Discrimination 144-175 (1966); Note, *Racial Discrimination and the NLRB: The Hughes Tool Case*, 50 Va. L. Rev. 1221 (1965); Note, *Administrative Enforcement of the Right to Fair Representation: The Miranda Case*, 112 U. Pa. L. Rev. 711 (1964).

157 Executive Order No. 8802, 6 Fed. Reg. 3109 (1941).

158 Executive Order No. 11246, 30 Fed. Reg. 12319 (1965).

suit to enforce the clause, recommending the institution of proceedings under Title VII of the Civil Rights Act, or, if the contractor filed false information, recommending that the Justice Department bring criminal proceedings against him.

With this wide range of penalties and sanctions the Executive Order can provide an effective remedy against discrimination by government contractors. In addition, although the obligation under a government contract really runs only from the contractor to the government, unions are also affected. It is not a defense for a contractor to claim he cannot correct his company's racial imbalance because it is forced to accept labor supplied by unions.[159] Either he provides equal opportunity, or he does not get government contracts.

Since the nondiscrimination clause contains the contractor's pledge not to discriminate, and, in addition, includes his promise to take affirmative action, this affirmative action imparts a stronger meaning than mere color-blindness.[160] Precisely what is required is unclear, but "affirmative action" has reached the point where the government is threatening to institute a quota plan whereby contracts would not be granted for federally subsidized construction projects, unless contractors could produce evidence that Negroes were holding a specified number of jobs.[161]

VI. Fourteenth Amendment—Economic and Political Pressure; Legal Threats

This section is devoted to a discussion of one particular area of the employment field and the attempts that have been made to break down the racial barriers in it. It is deemed worthy of discussion because the building trades industry has contained an unusually high rate of racial imbalance in employment opportunities and has been fervently resistent to change. Also, the remedial steps taken by aggrieved individuals and civil rights organizations have strayed from the conventional ones discussed.

A. *The Situation — An Irresistible Force Versus an Immovable Object*

The ability of labor unions to discriminate through denial of membership has its most far-reaching effect in a situation where employers depend primarily upon unions for their labor supply.

159 T. O'Hanlon, *The Case Against The Unions,* Fortune, Jan. 1968, at 190.

160 M. Sovern, *supra* note 8, at 142.

161 Wall Street Journal, Jan. 16, 1968, at 1, col. 5 (midwest ed.).

This is true of the building trades industry where contractors look to the unions with which they deal as their primary source of manpower. These unions frequently maintain "hiring halls" which are open only to union members. In many cases employers have signed agreements with such unions obligating themselves to fill their labor requirements through the union hiring halls rather than through public or private employment agencies. The obvious effect of such a situation is that denial of union membership to a Negro is the practical equivalent to denial of employment.[162] In addition, through the unions' control of apprenticeship training programs, they have the power to exclude Negroes from jobs and the opportunity to acquire necessary skills. The construction industry is "the sector of our economy with more registered apprenticeship programs than any other and the object of some of the bitterest protest of the whole civil rights movement."[163]

Racial imbalance in this segment of the employment field is apparent; fixing the responsibility for it is less clear. Both unions and employers have continued to "pass the buck" and attribute the existence of the situation to causes beyond their control or of a nondiscriminatory nature. Unions claim their lack of Negro membership results from the absense of skilled Negro craftsmen. Contractors deny responsibility for the racial imbalance on their projects because they hire exclusively from unions and cannot compel the unions to stop discriminating in membership. On the other hand, unions claim they are not discriminating on the basis of race, but that because a proposed member must have a sponsor and must be accepted by the other union members, only relatives or close friends of existing members are accepted. The continued existence of the imbalance has led to the situation where the emphasis is no longer on establishing culpability, but rather on curing the problem by fixing a definite responsibility. Particularly in the area of public works projects, where state and federal funds are involved, the immediate goal has become one of getting Negroes on the job. If unions refuse to refer Negro craftsmen, contractors must seek them elsewhere. Promises are no longer adequate; today visible proof is necessary.

B. *The Ethridge Case — Fixing the Responsibility*

In *Ethridge v. Rhodes*[164] plaintiffs brought a class action

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162 P. NORGREN & S. HILL, *supra* note 31, at 47.

163 M. SOVERN, *supra* note 8, at 177 (original footnote omitted).

164 268 F. Supp. 83 (S.D. Ohio 1967); Noted in 29 OHIO ST. L.J. 247 (1968).

against state officials to enjoin them from entering into contracts for construction of a building on the Ohio State University campus. The court accepted plaintiffs' contention that qualified Negroes would be unable to get jobs on the construction project because the proposed contractors would hire exclusively from craft unions which denied membership to Negroes. Because state officials knew about and acquiesced in this practice and were going to place the state in a position of interdependence with private individuals by entering into the contracts, the state would become a joint participant in a pattern of racially discriminatory conduct. This joint participation was held to constitute a type of "state action" proscribed by the equal protection clause of the fourteenth amendment to the United States Constitution.

In order to grant the injunction the court had to find the threatened injury irreparable and that there was no other adequate remedy in spite of the existence of state and federal statutes concerning equal employment opportunities. It was necessary to recognize that the procedure under Ohio's Fair Employment Practices law could redress plaintiffs' pecuniary damage, but the court asserted that neither the state nor federal statutes took any steps to mend the psychological damage that would be caused by the racially discriminatory exclusion of plaintiffs and the class they represented from participation in the construction project. In addition, the court followed the lead of *Brown v. Board of Education*[165] in pointing out that when discrimination receives the sanction of the government, it has a particularly harmful sociological and psychological impact. Thus the pecuniary awards available under the statutes were held not to provide an adequate remedy because the kind of injury caused by discrimination is not subject to monetary valuation. The court also mentioned the delay involved in administrative proceedings as a reason for their inadequacy as a remedy.

On this basis the court enjoined the state officials from entering into contracts with contractors who secure their labor force from unions which discriminate against Negroes. By so doing, the court placed the primary responsibility for curing the racial imbalance on public works projects on the state, a party only tangentially involved in the discriminatory conduct. This case marks a trend away from focusing all attention on the culpable party, toward a policy of bringing pressure to bear on the force best able to achieve immediate results.

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165 349 U.S. 294, (1955), *modifying* 347 U.S. 483 (1954).

C. *Behind the Scenes of Ethridge — How Is the Responsibility to Be Exercised?*

Assuming the judge realized that, although *Ethridge* only applied to one building, if the precedent is followed it "could halt all public construction where Negroes are not granted equal access to employment,"[166] he was probably convinced the state could expediently force a change in practices. Plaintiffs in *Ethridge* were faced with the deadlock between the contractors' claims that the unions were the cause of the alleged discrimination and that they used the unions as a source of labor because of practical necessity, and the unions' claims that qualified Negro craftsmen were not available and that they could not be expected to admit nonqualified Negroes when there were qualified caucasians waiting for membership. Thus during the proceedings in this case they filed a "Proposal By Which Relief May Be Granted," which attempted to spell out ways in which Negroes could be employed on the building project in question. Plaintiffs proposed to remedy the situation by forcing contractors awarded public works contracts to seek Negro skilled craftsmen from sources other than the allegedly discriminatory unions. It was pointed out that with the exception of two unions — the electricians, and the plumbers and pipe fitters — the contractors in accordance with their union contracts have the sole right to hire all their employees. Because there are no hiring hall agreements in all but the two trades mentioned, these contractors can go outside the discriminating unions and hire Negro workers directly. In the trades which have hiring hall agreements, plaintiffs asserted the contractors could avoid them. Since they are required by their contracts with the state to provide *qualified* work forces (as pointed out in the part of this study dealing with state laws against discrimination Ohio law requires that all public works contracts contain nondiscrimination clauses) and since the two unions which have hiring halls are obligated by their agreements with the contractors to supply *qualified* work forces, if the unions fail to refer skilled Negro workers, the contractors will be free under their union contracts to seek such workers outside of the hiring halls. Having refuted the necessity of using unions as the sole labor source, plaintiffs then suggested several sources of skilled, Negro, non-union craftsmen available to contractors. In addition, plaintiffs proposed that Negro high school graduates be placed on the building project as apprentices.

"The concept of the proposal was to suggest provisions which

166 FORTUNE, *supra* note 159, at 173.

the court could order included in project contracts"[167] and, to implement the order, plaintiffs proposed that the previously discussed Office of Federal Contract Compliance serve as a referee "to determine whether the efforts of contractors to offer equal employment opportunities have been reasonable and adequate."[168]

In response, defendants alleged that plaintiffs' proposal would accomplish less than Substitute House Bill No. 457, then pending in the Ohio General Assembly.[169] This bill, which was claimed a virtual certainty to be enacted, provided that:

> Any provision of a hiring hall contract or agreement which obligates a contractor to hire . . . only such employees as are referred to him by a labor organization shall be void as against public policy and unenforceable with respect to employment under any public works contract unless . . . such labor organization has in effect procedures for referring qualified employees for hire without regard to race, color, religion, national origin, or ancestry and unless such labor organization includes in its apprentice and journeymen membership, or otherwise has available for job referral without discrimination, qualified employees, both whites and non-whites . . . .[170]

Since this bill would invalidate exclusive hiring hall agreements with discriminating unions, it would free contractors to seek labor from other nondiscriminating sources. This is approximately the same result requested by plaintiffs except that it would be a state statute rather than a court decision. In addition, plaintiffs' proposal that Negro high school graduates be put on the job ignored the possibility that there might be a supply of individuals registered in the apprenticeship program who were awaiting the opportunity to work.[171]

Plaintiff replied that even if Substitute House Bill No. 457 were to be enacted it would not resolve the issues in the *Ethridge* case. First, the bill concerned only those craft unions which operate under exclusive hiring hall agreements of which there were only two on the building project involved in the case. Second, the

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167 Letter from Lewis M. Steel, attorney for plaintiffs, to Judge J. P. Kinneary, U.S. District Court, May 12, 1967, Civil Action 67-53, S.D. Ohio, Eastern Division.

168 Plaintiffs' Proposal By Which Relief May Be Granted 4, Civil Action 67-53, U.S. District Court, S.D. Ohio Eastern Division.

169 H. 457, 10th Gen. Assembly, 1st Sess. (1967).

170 *Id., subsequently enacted as* OHIO REV. CODE ANN. §§ 153.581, 153.591 (Page Current Service 1967).

171 Letter from William B. Saxbe, Attorney General of Ohio, to Judge J. P. Kinneary, U.S. District Court, May 10, 1967, Civil Action 67-53, S.D. Ohio, Eastern Division.

"bill is not self-enforcing and therefore does not resolve the essential question of state enforcement."[172] The state must see to it that its public works contractors are hiring qualified Negro craftsmen whether they be referred to them by unions or must be acquired from outside union sources; otherwise, the state is participating in a pattern of racial discrimination violative of the fourteenth amendment to the Constitution.[173]

It will be noted that both plaintiffs and defendants sought to allow contractors to hire outside discriminating unions. The primary goal was to put Negroes on the job; it was secondarily hoped that unions would abandon their discriminatory policies in order to maintain their position as exclusive hiring sources for the contractors. The difference arose as to whether the state could fulfill its responsibility by passing the proposed legislation freeing the contractor from agreements with discriminating unions, and thereafter making the contractor bear the burden of discrimination claims, or whether the state should have the additional responsibility of *making sure* its contractors provide equal employment opportunities.

The court in *Ethridge* held that state officials could enter into contracts only with contractors "who will obligate themselves and be legally eligible and prepared actually to secure a labor force only from sources that will reasonably insure equal job opportunities to all qualified persons . . . without regard to race, color, or membership or non-membership in the labor union."[174] In other words, the court's opinion ordered the state to require its potential contractors to demonstrate three things, although it failed to indicate just how and to what extent this was to be done. The contractor who submits a bid on a state project must in some manner "obligate himself" to secure his labor only from sources that will reasonably insure equal opportunities. In addition, he must be "legally eligible" to secure labor from such source, apparently meaning that he must not be bound by a hiring hall agreement with a discriminating union. Finally, the contractor must demonstrate that he is "prepared actually" to obtain his labor force from a source that reasonably insures non-discrimination.

D. *Events After Ethridge — The State Takes Action*

Several weeks after the decision in *Ethridge,* Ohio's General

172 Letter, *supra* note 167.

173 Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

174 Ethridge v. Rhodes, 268 F. Supp. 83, 90 (S.D. Ohio 1967).

Assembly passed Substitute House Bill No. 457[175] thereby making every contractor "legally eligible" to hire from non-discriminating sources. No longer could public works contractors claim they were bound to secure workers from a discriminating union since the new law made all such agreements void and unenforceable.[176]

Several days after the enactment of the new statute, another step was taken to assure compliance with the court order in *Ethridge*. The Governor issued an Executive Order[177] which, in essence, proclaims that the state will not deem responsive any bid from a contractor who fails to file with his bid pledges and commitments to the effect that:

> (1) He and his subcontractors will act effectively to insure that employees are selected and treated equally without regard to race, color, religion, national origin, or ancestry.
>
> (2) He and his subcontractors will use as hiring sources only those in which access to referral facilities is open to all qualified persons without discrimination.
>
> (3) He and his subcontractors will avail themselves where appropriate of the provisions of the new statute [referred to previously as Substitute House Bill No. 457[178]] and hire outside the discriminating union.
>
> (4) He and his subcontractors will accept compliance reviews and furnish all information requested.

If a breach of these pledges and commitments is discovered the contract after thirty days notice will be suspended for not more than thirty days, during which time the contractor may cure his breach. Failure to do so results in cancellation of his contract.

The results of these first attempts by the state to exercise its *Ethridge*-born responsibility remain to be seen. The implications of the Executive Order would seem to be that a contractor in addition to obligating himself through pledges submitted with his bid to secure labor from non-discriminating sources would, in fact, be "prepared actually" to hire from such sources and insure equal opportunity to Negro applicants for fear of having his contract cancelled. Additionally, it may be hoped that unions which had previously excluded Negroes will abandon their discriminatory policies rather than face giving up the opportunity to be hiring sources for public works contractors. It would certainly not help the unions' bargaining position for contractors to develop the habit of hiring

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175 OHIO REV. CODE ANN. §§ 153.581, 153.591 (Page Current Service 1967).

176 *Id.*

177 Executive Order of June 5, 1967.

178 OHIO REV. CODE ANN. §§ 153.581, 153.591 (Page Current Service 1967).

skilled non-union labor. Even though the new law and Executive Order only apply to public works, some carry-over into private construction might be expected.

As to the effect of the above plan, some assert that contractors will be tempted to hire unqualified Negroes, if qualified are unavailable, in order to attract and hold public works contracts through showing non-discrimination by a substantial number of Negroes being on their payrolls. From this presumption it is argued that, in addition to the reverse discrimination caused by such action, the public would end up with inferior construction because of the use of below-par labor. Although this situation could occur, it is made less likely by the fact that the contractor must meet specifications and inspections, and would not desire to be responsible for an inferior job.

Determining what the public works contractor must do to satisfy these new requirements is not exactly clear. The situation is similar to what has been pointed out about the federal contractor program:

> The relevant contractual language [in federal contracts] does not, as do other fair employment schemes, merely forbid discrimination. It imposes an 'affirmative' duty on the contractor to see that he does not discriminate. Such a pledge seems at first glance a puzzle. The only precise thing one can say about an affirmative duty not to do something is that it is the converse of a negative duty not to refrain from doing something. Beyond this all that is clear is that an imaginative lawyer can take these words and run and run and run.[179]

The Executive Order and the court's order in *Ethridge,* while imposing an affirmative duty on state public works contractors to hire from non-discriminating sources, leave the initial decision as to what is a discriminating labor source in the hands of the contractor without guidelines or precedents. Perhaps at first the hiring of a small number of Negroes will assure compliance. However, once the barrier is broken down, it would seem inevitable that some form of quota system will have to be used to determine degrees of discrimination. This will result in a contractor who has less than a certain percentage of Negro employees having the burden of proving that his source of labor does not discriminate or suffering the loss of his contract. This would seem to be a difficult task.

> [I]t may . . . be that a bidder who reports substantially fewer Negroes than his competitors . . . will not be awarded a

179 Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern,* 34 U. CHI. L. REV. 817, 845 (1967).

> contract as a result of his 'discrimination'. Since the contract is of great value, employment qualifications can be sacrificed, and our 'hopefuls' [for government contracts] would be well advised to match their competitors, perhaps even outdo them, in implementing a 'fair employment practice' program.
>
> To be sure, a program of this character puts Negroes to work but at a substantial cost. The principal of color-blindness in employment is abandoned for the hidden subsidization of Negro hiring by the . . . government. Contractors, to gain favor with the contracting agencies . . ., are forced to hire on racial grounds without regard to qualifications.[180]

The result of *Ethridge* to the taxpayer was costly in the sense that new bids for the project were opened a couple of months later with virtually the same contractors submitting low bids. This time, however, winning bids were 674,800 dollars higher than previously. But this figure is insignificant when compared with the possible outcome of a suit now pending before the same court that decided the *Ethridge* case. In this case the next logical step was taken by bringing a suit citing *Ethridge,* but seeking to enjoin construction on all public works projects within the jurisdiction of the court — the southern half of Ohio. The loss, if such an injunction is granted, might run into millions of dollars. That it will have benefits as far as putting Negroes on the job is not disputed, but the already-existing legislative remedies could do the same. The time saved by the court injunction hardly seems worth the expense involved, if the effect is to lessen reliance on administrative agencies and interject the court into an area ill-suited to judicial supervision. Perhaps if the money the state would otherwise lose because of the halting of its construction projects were given to the Civil Rights Commission, the benefits derived therefrom would cause the court to consider it an effective remedy.

E. *Effect of Ethridge Decision*

Armed with the threat of additional court actions tying up more public construction projects, the National Association for the Advancement of Colored People began negotitions with Ohio State University officials to seek the hiring of Negroes on its projects. The result was an agreement by University officials to see that up to 140 Negroes whether union members or not were hired within three months. The labor director of the NAACP hailed this as a landmark agreement which will become the basis for negotiations and court actions in other states. " 'If Negro workers don't work on tax-supported construction, then nobody will work. If

180 *Id.*

necessary, let there be a national moratorium on public works construction' if Negroes are not treated equally in hiring . . . ."[181]

The situation is still not resolved even though the University agreed to set up its own apprentice training program for Negroes.[182] The NAACP claims University officials are not trying in good faith to fulfill their agreement.[183] The results of the pressure tactics remain to be seen. This alternative is just one of many available for the elimination of discrimination in employment, and perhaps the least satisfactory economically and politically. The result of court suits and pressure tactics might tend to be detrimental to the overall struggle to eliminate discrimination in employment if the use of energy therein weakens efforts to improve administrative remedies. The goal of a commission adequately supplied with manpower and money, prepared to process efficiently complaints of discrimination and trained to mould relief particularly suitable to each situation, should not be overshadowed. It can be attained.

David T. Milligan

181 Columbus Dispatch, Dec. 29, 1967, at 3A, col. 3.

182 Columbus Dispatch, Feb. 5, 1968, at 19B, col. 5. The program would be open to qualified Negroes turned down by unions for apprenticeship training. Trainees will work on university construction projects while taking evening classes. The estimated cost per trainee would be about $100 to $200 per year. *Id.*

183 Columbus Dispatch, Feb. 8, 1968, at 16 A., col. 1.